Supreme Court, U.S.
FILED

97 696 OCT 21 1997

OFFICE OF THE CLERK

No. _____

In the SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

LAWRENCE FAFARMAN,
Petitioner,

-VS-

U.S. ENVIRONMENTAL PROTECTION AGENCY
et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Lawrence Fafarman
5298½ Village Green
Los Angeles, CA 90016
(213) 293-6029
Petitioner, *pro se*

25 pp

QUESTIONS PRESENTED

Five issues are presented here for review.

1st Issue: The court's opinion disagreed with a material allegation that was not disputed by any party or intervenor in the case. Basis for writ: Supreme Court Rule 10(a)

2nd Issue: The court's ruling that the petitioner's constitutional claims were "untimely" is contrary to the principle that statutory bars to constitutional claims are barred by the Supremacy Clause of the U.S. Constitution, Article VI, Clause 2. See Carter v. Carter Coal Co., 298 U.S. 238, 296-297 (1935) Basis for writ: Supreme Court Rule 10(c)

3rd Issue: The right to sue "at any time" for withdrawal of the so-called "California waivers" (42 U.S.C. §7543(b)) was implicit in a Senate report's reassurance that the U.S. Environmental Protection Agency ("EPA") would have the right to withdraw those waivers "at any time," and under "the cardinal rule .... that repeals by implication are not favored," Posadas v. National City Bank, 296 U.S. 497, 503, this right to sue "at any time" was not implicitly repealed by 42 U.S.C. §7607(b)(1)'s general time limits for filing suit. Basis for writ: Supreme Court Rule 10(c)

4th Issue: 42 U.S.C. §7607(b)(2) indicates that 42 U.S.C. §7607(b)(1)'s 60-day time limits for petitioning for judicial review were intended to apply only to court actions seeking "enforcement," whereas, in the words of Heckler v. Chaney, 470 U.S. 821, 831-832, this petitioner was not seeking "enforcement" but was seeking review of "affirmative act[s] of approval": the EPA's grants of the so-called California waivers pursuant to 42 U.S.C. §7543(b). Basis for writ: Supreme Court Rule 10(c)

5th Issue: A petitioner seeking reversal of an agency action need only show that non-reversal denies relief, and need not show that that action was immediate or direct cause of injury. Basis for writ: Supreme Court Rule 10(a)

TABLE OF CONTENTS

QUESTIONS PRESENTED -i-

TABLE OF AUTHORITIES -iii-

CASE INFORMATION 1

STATEMENT OF CASE

BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE (D.C. CIRCUIT COURT OF APPEALS) 2

BACKGROUND 2

REASONS FOR GRANTING WRIT

APPLICABLE SUPREME COURT RULE 10 REASONS 5

FIRST ISSUE FOR REVIEW 6

SECOND ISSUE FOR REVIEW 8

THIRD ISSUE FOR REVIEW 10

FOURTH ISSUE FOR REVIEW 12

FIFTH ISSUE FOR REVIEW 13

APPENDIX 1a

TABLE OF AUTHORITIES

Abbott Laboratories v. Gardner, 387 U.S. 136, 140-141 (1966)	11
Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1983)	10
Califano v. Sanders, 430 U.S. 99, 109(1976)	8
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402	12
Carter v. Carter Coal Co., 298 U.S. 238, 296-297 (1935)	9
Heckler v. Chaney, 470 U.S. 821, 831-832	12,13
Johnson v. Robison, 415 U.S. 361, 366(1973)	9
Jordan v. Calif Dept. of Motor Vehicles, the California Superior Court, County of Sacramento, Case #95AS05228, April 9, 1997	5
Posadas v. National City Bank, 296 U.S. 497, 503 (1935)	11
Senate Report No. 403, 90th Congress -- 1st Session, p. 34.	10
5 U.S.C. §551(13)	13,15

5 U.S.C. §702	14,15
28 U.S.C. §1254(1)	1
42 U.S.C. §7543(a)	2
42 U.S.C. §7543(b)	2,4,11,13,14
42 U.S.C. §7604	7,8
42 U.S.C. §7607	2,4,8,12,14,15
Public Law 90-148	11
Public Law 91-604	11
California Revenue and Taxation Code, §§6261-6263 (Vehicle Smog Impact Fee)	3
U.S. Constitution, art. I, sec. 8, cl. 3 (Commerce Clause)	4,5
U.S. Constitution, art. III, sec. 2, cl. 1	7
U.S. Constitution, art. IV, sec. 2, cl. 1 (Privileges and Immunities Clause)	4
U.S. Constitution, art. VI, sec. 2 (Supremacy Clause)	8,9

CASE INFORMATION

Official court opinions or orders: Lawrence Fafarman v. U.S. Environmental Protection Agency et al., U.S. Court of Appeals for the District of Columbia Circuit, Case No. 96-1473. This suit was filed as an *original* action in the D.C. Circuit Court of Appeals, pursuant to 42 U.S.C. §7607(b)(1) (hence there is no district court judgment)

Date of entry of judgment: June 30, 1997

Date of entry of denials of rehearing and rehearing *en banc*: August 28, 1997

Statute conferring jurisdiction on U.S. Supreme Court: 28 U.S.C. §1254(1).

Statutes and constitutional provisions involved in the case:

42 U.S.C. §7543(a)

42 U.S.C. §7543(b) ("California Waiver" provision)

42 U.S.C. §7607

5 U.S.C. §551(13)

5 U.S.C. §702

California Revenue and Taxation Code §§6261-6263 ("Vehicle Smog Impact Fee")

Commerce Clause of U.S. Constitution (Art. I, Sec. 8, Clause 3)

Privileges and Immunities Clause of U.S. Constitution (Art. IV, Sec. 2, Clause 1)

Supremacy Clause of the U.S. Constitution (Art. VI, Clause 2)

STATEMENT OF CASE

BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE (COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT)

Original jurisdiction of the D.C. Circuit Court of Appeals is based on 42 U.S.C. §7607(b)(1)'s provision that, in addition to petitions for review of certain enumerated EPA actions, a petition for review of "any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter" may be filed only in that court. So-called "California waivers" (42 U.S.C. §7543(b)) are considered to be "nationally applicable" agency actions because they affect automotive manufacturers, suppliers and dealers throughout the nation.

BACKGROUND

Under 42 U.S.C. §7543(b), sometimes called the "California waiver" provision, the respondent EPA has on several occasions granted California a waiver of 42 U.S.C. §7543(a), which generally prohibits individual States from establishing their own new-car emissions-control regulations. As a result of these waivers, hereafter called "California waivers" or simply "waivers," new cars sold in California have California emissions-control certification instead of federal emissions-control certification. However, depending on the model of vehicle, the federal emissions standards and the California emissions standards are sometimes the same. In some cases, new cars sold outside of California have

California new-car certification.

With certain narrow exceptions that are not based on emissions levels, California arbitrarily charges an extra fee of $300, called the "Vehicle Smog Impact Fee" (California Revenue and Taxation Code §§ 6261-6263), for the new registration of a used out-of-state motor vehicle if that vehicle has the federal new-car emissions-control certification instead of the California certification (as noted above, some cars that were sold new outside California have the California certification). In summary: without the California waivers, there could be no California new-car emissions certification, and without California new-car emissions certification, there could be no Vehicle Smog Impact Fee, as all cars would then have the same new-car emissions certification (federal) and there would be no basis for the fee. Thus, the Vehicle Smog Impact Fee is entirely based on the California waivers and owes its existence to those waivers. The California Dept. of Motor Vehicles (DMV) is directed to deposit these fees in the state's General Fund after deducting authorized administrative costs. Payment of this fee does not provide the vehicle's owner with any relief from the requirements of California's emissions-control inspection & maintenance programs, including the stringent new program known as "Smog Check II," and there is absolutely nothing that can legally be done to the car to avoid this fee. A California Dept. of Motor Vehicles brochure, titled, "Nonresident Vehicle Smog Impact Fee," states, in part,

> Payment of the $300 Nonresident Vehicle Smog Impact Fee does not exempt a vehicle from the smog inspection, equipment, and minimum performance, or any other requirements.
>
> Issuance of valid Certification of Compliance from a smog check station or an engine identification

label issued by the Bureau of Automotive Repair does not exempt a vehicle from the $300 Nonresident Vehicle Smog Impact Fee.

Vehicles are certified at the time of manufacture. After manufacture, a vehicle's certification cannot be changed by the addition or replacement of equipment. (http://www.dmv.ca.gov/Brochures/Fast_Facts/FFVR3.html)

Pursuant to 42 U.S.C. §7607(b)(1), this petitioner filed in the D.C. Circuit Court of Appeals a petition seeking reversal of a particular waiver (final rule published in **Federal Register**, page 53371, Vol. 61, No. 199, Oct. 11, 1996; EPA Air Docket #A-90-28), within 42 U.S.C. §7607(b)(1)'s 60-day time limit for such petition. The petition charged that the Vehicle Smog Impact Fee violates 42 U.S.C. §7543(b) (the so-called "California waiver" provision) and the U.S. Constitution's Commerce Clause (Art. I, Sec. 8, Clause 3) and Privileges and Immunities Clause (Art. IV, Sec. 2, Clause 1). The EPA moved for dismissal of the petition on grounds that the petitioner had not submitted timely comments to the agency's docket for this particular waiver (though the petitioner had submitted to the EPA many complaints about this fee long before the end of the official comment period for this particular waiver) and on the grounds that the issues raised by the petitioner were unrelated to the waiver in question. The court responded by dismissing the nonconstitutional claim (alleged violation of 42 U.S.C. §7543(b)), but did not at the same time dismiss the constitutional claims, seemingly accepting the petitioner's argument that constitutional claims have priority over statutory restrictions on judicial review (as discussed below under the "Second Issue for Review," the court apparently reversed itself by later rejecting this argument). However,

the court ordered the petitioner to show cause as to why his constitutional claims should not also be dismissed, and allowed the EPA to file an answer. The petitioner, when filing his brief for show of cause, amended his original petition by adding a demand for a withdrawal proceeding (starting with public hearings) against all California waivers, not just the single waiver originally challenged by the petition. The purpose of the amendment was to guarantee a remedy for the constitutional claims: withdrawing all California waivers would end California emissions certification of new cars (as noted above, such certification is the sole basis of the fee), and thus prevent assessment of the fee on cars produced in the future. The court subsequently dismissed the constitutional claims also.

Incidentally, on April 9, 1997, the California Superior Court, County of Sacramento, in Jordan v. Calif. Dept. of Motor Vehicles, Case #95AS05228, ruled that this fee violates the U.S. Constitution's Commerce Clause.

REASONS FOR GRANTING WRIT

APPLICABLE SUPREME COURT RULE 10 REASONS

Five issues are raised here for review. The first and fifth issues rely on that part of Supreme Court Rule 10(a) that states, "a U.S. court of appeals .... has so far departed from the accepted and usual course of judicial proceedings ..... as to call for an exercise of this Court's supervisory power."

The other three issues (the second, third, and fourth issues) rely on the part of Supreme Court Rule 10(c) which

states, "... a United States court of appeals ..... has decided an important federal question in a way that conflicts with relevant decisions of this Court."

FIRST ISSUE FOR REVIEW

The first issue for review is that the D.C. Circuit Court of Appeals, by disagreeing with an allegation that was not disputed by any party or intervenor in the case, "so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." (Supreme Court Rule 10(a)). The allegation in question is the petitioner's allegation that the Vehicle Smog Impact Fee could not exist if no California waivers had ever been granted.

In a baldfaced falsification, the judgment dismissing the petition, Order of 6-30-97 in the Appendix, stated, "The Vehicle Smog Impact Fee and the waiver nominally at issue in this case are related only in that the fee *might not* exist but for the waiver and its predecessors." (emphasis added) However, the respondent EPA itself admitted that the fee *could not* exist but for the waiver and its predecessors, affirmatively stating,

> .... if EPA did not grant preemption waivers to California, there *would be no* "California cars" .... Without "California cars," there *could be no* smog impact fee, whose existence is premised on the distinction between "California cars" and "federal cars." Respondent's Reply to Petitioner's Show of Cause and Amendent to Petition at 4 (emphasis added).

Furthermore, the State of California was an intervenor in this case on behalf of the respondent EPA, and

California did not claim that anything that was said about the fee was false. The difference between the terms "might not" and "could not" is *critical* in answering the crucial question of whether withdrawal of all the California waivers would *guarantee* some relief for the constitutional claims by positively preventing assessment of the fee on cars produced in the future for sale in the U.S.. It is obvious that the court dishonestly substituted the incorrect term "might not" in place of the correct term "could not" in order to provide support for its false finding that "the relationship between the waiver and the fee is insufficient to allow review of the fee on petition for review of the waiver." (Order of 6-30-97 in Appendix).

The respondent EPA also argued that the suit should be dismissed on the grounds that the constitutional claims against the fee could be presented in a State court. The petitioner countered by arguing that a federal-court remedy would not necessarily duplicate a state-court remedy, because the federal-court remedy might be faster than or greater than the state-court remedy, or might supplement the state-court remedy. Also, under the principle of *concurrent jurisdiction*, federal courts and state courts may both have jurisdiction over the same question. Anyway, this argument of the EPA was not discussed in the court's judgment.

Furthermore, this petitioner even disputes the EPA's claim that -- in order to satisfy the "cases" and "controversies" requirement of Article III, Sec. 2, Clause 1 of the U.S. Constitution -- he must prove that there was a personal injury-in-fact that is traceable to the respondent's actions and that is remediable by the court. The courts have not been consistent in requiring such proof. For a suit under the Clean Air Act's "citizen suit" section, 42 U.S.C. §7604, a petitioner's burden of proving such a personal injury is no greater than a lynch mob's; that is why such suits are called

"citizen suits." If proof of such a personal injury is an absolute minimum constitutional requirement for standing to sue, as claimed by the EPA, then 42 U.S.C. §7604 is unconstitutional.

SECOND ISSUE FOR REVIEW

The second issue here is the petitioner's contention that statutory bars to constitutional claims -- whether such bars are express or implicit -- are barred by the Supremacy Clause of the U.S. Constitution, Article VI, Clause 2.

As noted above, the petitioner amended his suit by adding a demand for withdrawal of all California waivers, not just the single waiver originally challenged by the petitioner. The court's judgment called this amendment "untimely," apparently referring to 42 U.S.C. §7607(b)(1)'s 60-day time limits for petitioning for review of certain agency actions made under the Clean Air Act as amended (there was no question as to the timeliness of the filing of the original petition challenging just the single waiver, as that filing was made within the time period specified by the EPA in the **Federal Register**). This petitioner repeatedly pointed out that constitutional claims are not subject to statutory time limits. Thr Supreme Court has said,

> .... when constitutional questions are in issue, the availability of judicial review is presumed, and we will not take the "extraordinary" step of foreclosing jurisdiction unless Congress' intent to do so is manifested by "clear and convincing" evidence. Califano v. Sanders, 430 U.S. 99, 109(1976)

There is no "clear and convincing" evidence of Congressional intent to bar the constitutional claims in the

present lawsuit. Furthermore, even if a statute showed such intent, this court has ruled in Johnson v. Robison, 415 U.S. 361, 366(1973), that such intent would "raise serious questions concerning the constitutionality" of the statute itself. Furthermore, the petitioner asserts that the preceding Supreme Court rulings grossly understate the case against statutory bars of constitutional claims. Allowing such a bar would put the cart before the horse by making statutory law superior to constitutional law. The Supremacy Clause of the U.S. Constitution states,

> This Constitution, *and the laws of the United States which shall be made in pursuance thereof*; and all treaties made, or which shall be made, under the authority of the United States, shall be the *supreme law of the land* ....
> (Article VI, Clause 2 of the U.S. Constitution, emphasis added)

A law which bars -- or attempts to bar -- constitutional claims is obviously not "in pursuance" of the Constitution, and thus -- under the Supremacy Clause above -- is not co-equal with the Constitution as part of the "supreme law of the land." In regard to the above excerpt of the Supremacy Clause, this court has said,

> The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal ..... must apply the supreme law and reject the inferior statute whenever the two conflict. Carter v. Carter Coal Co., 298 U.S. 238, 296-297 (1935).

THIRD ISSUE FOR REVIEW

As noted above, the judgment dismissing this case, referring to the petitioner's amendment demanding withdrawal of all California waivers and presumably referring to 42 U.S.C. §7607(b)(1)'s 60-day time limit for petitioning for review of agency action, claimed, "the amendment is untimely."

The Congressional report that introduced the "California waiver" provision (now 42 U.S.C. §7543(b) as amended) contained the following reassurance:

> *Implicit* in this provision is the right of the Secretary to withdraw the waiver *at any time* after notice and an opportunity for public hearing [if] he finds that the State of California no longer complies with the conditions of that waiver. Senate Report No. 403, 90th Congress -- 1st Session, p. 34. (Emphasis added by petitioner. The word "if," absent in the original, was added for the sake of clarity. The "Secretary" is the Secretary of Health, Education, and Welfare, predecessor of the EPA Administrator in administering the California waiver provision)

The Supreme Court has ruled that *legislative history* is a factor in determining judicial reviewability:

> Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its *legislative history*, and the nature of the administrative action involved. Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1983) (emphasis added)

The preceding Senate Report excerpt is a fundamental part of the *legislative history* of the "California waiver" statute, 42 U.S.C. §7543(b): this Senate Report accompanied the bill that introduced this statute, and this excerpt discussed the originating Senate committee's interpretation of the "implicit" meaning of the statute. Presumably, the only reason that the statute itself did not expressly state that the Secretary (or the EPA) has the right to withdraw the waiver "at any time" was that the Senate committee evidently believed that such a statement would have been superfluous, since the committee believed that such right was already "implicit" in the proposed statute.

Furthermore, the right to sue "at any time" for withdrawal of a California waiver is implicit in the above Senate Report reassurance, because this Court has ruled that judicial review of agency action may be denied only upon "clear and convincing" evidence of Congressional intent to preclude such review, Abbott Laboratories v. Gardner, 387 U.S. 136, 140-141 (1966), and there is no evidence of such intent in this case (even supposing that Congress has the doubtful right to bar review of constitutional claims). The judgment in the present lawsuit implicitly ruled that this right to sue "at any time" for withdrawal of California waivers (established by Public Law 90-148) was implicitly repealed by 42 U.S.C. §7607(b)(1)'s general time limits (established by Public Law 91-604; later extended from 30 days to 60 days). However, the U.S. Supreme Court has stated, "The cardinal rule is that repeals by implication are not favored," Posadas v. National City Bank, ("Posadas"), 296 U.S. 497, 503 (1935), and "the intention of the legislature to repeal must be clear and manifest," Posadas, *ibid.*. There is no evidence in this case of any Congressional intention to repeal the above-described implied right to sue "at any time" for the withdrawal of California waivers.

FOURTH ISSUE FOR REVIEW

42 U.S.C. §7607(b)(2), referring to the 60-day time limits of 42 U.S.C. §7607(b)(1), shows that those time limits are intended to apply only to judicial reviews seeking *enforcement*:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings *for enforcement*.
> (from 42 U.S.C. §7607(b)(2), emphasis added)

Indeed, if the preceding sentence was not intended to restrict the 60-day time limits to *enforcement* actions, then the words "for enforcement" in that sentence would be superfluous; indeed, the entire sentence would then be superfluous, as applicability of the time limits to challenges of EPA actions *in general* is apparent in subsection 42 U.S.C. §7607(b)(1).

The petitioner argued that one reason why those time limits do not apply here is that he is, in the words of Heckler v. Chaney ("Chaney"), 470 U.S. 821, 831-832, seeking review of "affirmative act[s] of approval" rather than seeking "enforcement." In Chaney, judicial review under 5 U.S.C. §702 was denied on the grounds that the challenged agency inaction was a decision not to "enforce," and that, with regard to judicial standing under 5 U.S.C. §702, such decisions are committed to agency discretion. The Supreme Court, in explaining why review under 5 U.S.C. §702 was granted in Citizens to Preserve Overton Park v. Volpe ("Overton Park"), 401 U.S. 402, while being denied in Chaney, said,

> Overton Park did not involve an agency's refusal to take requested *enforcement action*. It involved an

> *affirmative act of approval under a statute that set clear guidelines for determining when approval should be given.* Refusals to take enforcement steps generally involve precisely the opposite situation
> .....
> Chaney, *supra*, 470 U.S. at 831 (Emphasis added).

For the following reasons, a California waiver is an "affirmative act of approval" rather than an "enforcement action": (1) California waiver determinations are not "enforcement actions" because the EPA has no authority to *enforce* California's compliance with the terms of the waivers, the EPA's sole authority here being to grant, deny or withdraw the waivers; and (2) a grant of a California waiver is, in the words of Chaney above, an "affirmative act of approval under a statute that set clear guidelines for determining when approval should be given," that statute being 42 U.S.C. §7543(b).

FIFTH ISSUE FOR REVIEW

The Order of 6-30-97 dismissing this lawsuit -- see Appendix -- claims that the petitioner's amendment seeking withdrawal of all California waivers "suffers from the same defects as the original petition" which sought reversal of a single waiver, one of those alleged defects being that "petitioner has not demonstrated that the waiver itself is unconstitutional." However, the petitioner is *not* required to show that the waivers themselves are -- or were -- unconstitutional; the petitioner need only show that EPA's failure to withdraw the waivers denies relief for his constitutional claims. The definition of "agency action" in 5 U.S.C. §551(13) from the Administrative Procedures Act

("APA") includes "denial" of relief and "failure to act." The petitioner's amended suit charged that the EPA denied relief for his constitutional claims by failing to withdraw all California waivers because of the unconstitutional Vehicle Smog Impact Fee; as noted above, withdrawal of all the waivers would provide some relief for the constitutional claims by positively preventing assessment of the fee on cars produced in the future. Also, 5 U.S.C. §702 of the APA provides judicial standing not just for persons suffering legal wrong *because* of agency action, but also for persons "adversely affected or aggrieved" by agency action; this statute states, in part,

> A person suffering legal wrong *because* of an agency action, or *adversely affected or aggrieved* by agency action within the meaning of a relevant statute, is entitled to judicial review thereof .... (from 5 U.S.C. §702, emphasis added)

In other words, under 5 U.S.C. §702, the agency action need not be the direct *cause* of the injury; this statute only requires that a petitioner be "adversely affected or aggrieved" by the agency action. The present petitioner is "adversely affected" and "aggrieved" by the so-called California waivers (42 U.S.C. §7543(b)) because these waivers are the sole basis of the unconstitutional Vehicle Smog Impact Fee of California.

Under 42 U.S.C. §7607(d)(1)(V) ("such other action as the Administrator may determine"), the EPA has the option of applying 42 U.S.C. §7607(d) to California waiver proceedings, and the EPA has already in this case chosen that option by invoking 42 U.S.C. §7607(d)(7)(B) (generally denying judicial review for issues not raised during the public comment period) against the petitioner's claims.

Hence, 42 U.S.C. §7607(d) applies to this suit, and the preceding two APA provisions, 5 U.S.C. §551(13) and 5 U.S.C. §702, were *not* among the following APA provisions generally excluded by 42 U.S.C. §7607(d)(1), indicating that Congress intended these two preceding APA provisions to apply to rulemaking under 42 U.S.C. §7607(d):

> The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies.
> (from 42 U.S.C. §7607(d)(1))

Lawrence Fafarman,
Petitioner, *pro se*

APPENDIX

WRITTEN OR ORAL COURT OPINIONS, ORDERS, FINDINGS OF FACT, ETC.

ORDER OF 6-30-97 (final judgment)
U.S. Court of Appeals for the District of Columbia Circuit
Case No. 96-1473, Lawrence Fafarman, petitioner, v. U.S. Environmental Protection Agency *et al.*, respondents
Date of entry: June 30, 1997
Before: Wald, Rogers, and Tatel, Circuit Judges

Pursuant to 42 U.S.C. 7607(b)(1), this petition was filed as an *original* action in the D.C. Circuit Court of Appeals (therefore there is no district court judgment)

Text:

> Upon consideration of the court's order to show cause filed April 25, 1997, the response thereto and amendment to the petition for review, the reply, the unopposed motion for leave to file a reply to the reply, and the lodged reply to the reply, it is
>
> **ORDERED** that the motion for leave to file a reply to the reply be granted. The Clerk is directed to file the lodged pleading. It is
>
> **FURTHER ORDERED** that the order to show cause be discharged. It is
>
> **FURTHER ORDERED** that the amendment be dismissed. The amendment is untimely and suffers from the same defects as the original petition, discussed below. It is

FURTHER ORDERED that the remainder of the petition for review (that is, the constitutional claims) be summarily denied. The merits of the parties are so clear as to warrant summary action. See Cascade Broadcasting Group Ltd. v. FCC, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam). The Vehicle Smog Impact Fee and the waiver nominally at issue in this case are related only in that the fee might not exist but for the waiver and its predecessors. However, petitioner has not demonstrated that the waiver itself is unconstitutional, and the relationship between the waiver and the fee is insufficient to allow review of the fee on petition for review of the waiver.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir Rule 41.

Per Curiam

s/(judges' initials)

Denial of rehearing
Date of entry: Aug. 28, 1997
Text:

Upon consideration of petitioner's petition for rehearing filed July 22, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: s/Robert A. Bonner
Robert A. Bonner, Deputy Clerk

Denial of rehearing *en banc*
Date of entry: Aug. 28, 1997
Text:

Upon consideration of petitioner's Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk
BY: s/Robert A. Bonner
Robert A. Bonner, Deputy Clerk

LAWS AND CONSTITUTIONAL PROVISIONS

42 U.S.C. §7543 State Standards

(a) Prohibition No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

(b) Waiver

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emissions standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the standards will be,

in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that --

(A) the determination of the State is arbitrary and capricious,

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or

(C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

(2) .....

(3) .....

(California is the only state satisfying the preceding March 30, 1966 requirement, hence this waiver is often called the "California waiver")

COMMERCE CLAUSE OF U.S. CONSTITUTION

(art. I, sec. 8) The Congress shall have power -- (clause 3) To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

- -

PRIVILEGES AND IMMUNITIES CLAUSE OF THE U.S. CONSTITUTION

(Art. IV, Sec. 2, Clause 1) The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

SUPREMACY CLAUSE OF THE U.S. CONSTITUTION

(Art. VI, Clause 2) This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.